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Kerajaan Malaysia v RHB Insurance Bhd

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HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22NCC-615–10 OF 2013
NALLINI PATHMANATHAN J
20 FEBRUARY 2014

C

Contract — Guarantee — Forgery — Document purporting to be advance payment bond in favour of plaintiff allegedly signed by defendant's branch manager — Defendant contended bond not issued by it and was fraudulent — Plaintiff failed to call branch manager and to establish who was maker of document to prove its authenticity — Whether plaintiff could invoke principle of ostensible authority, Turquand's Rule or estoppel to hold defendant liable — Whether requirements for principle of ostensible authority to operate met — Whether doctrine of estoppel had application — Whether Turquand's Rule could apply if bond was fraudulent — Whether plaintiff should not have accepted bond because of several serious discrepancies/irregularities on its face

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The plaintiff sought to enforce an advance payment bond ('the bond') for RM10m purportedly issued by the defendant irrevocably guaranteeing the plaintiff on demand payment of that sum. It was on the strength of the bond that the plaintiff advanced RM10m to a contractor to carry out works on a project. The plaintiff accepted the bond without inquiry although the

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document bore several material discrepancies on its face – it contained the signature of the then manager ('Sulaiman Abdul Razak') of the defendant's branch; the document did not contain any letterhead, let alone the defendant's; it was executed before a commissioner for oaths; the details of the contract between the plaintiff and the contractor were incorrectly set out in the bond;

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there were two different dates on the bond and the authenticity of the bond was verified only by Sulaiman Abdul Razak himself by way of a letter. Following the plaintiff's termination of the contractor's contract for default and its failure to recoup any part of the advance payment made, the plaintiff sought full payment under the bond. The defendant denied liability saying, inter alia, that

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it did not issue the bond and that even if the document was signed by Sulaiman Abdul Razak, he did not have actual or ostensible authority to issue it such as to bind the defendant. The defendant also contended that given the serious discrepancies evident on the face of the bond, the plaintiff should not have accepted it and should have been put on inquiry. The defendant submitted that

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it was for the plaintiff to establish that the bond was genuine as there was no evidence the document was in fact signed by Sulaiman Abdul Razak who had not been called as a witness. On the other hand, the plaintiff maintained that Sulaiman Abdul Razak did have ostensible authority to act on behalf of the defendant and that the defendant was estopped from denying the authenticity

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and efficacy of the bond. The plaintiff also relied upon Turquand's Rule (the Indoor Management Rule) to say it had no reason to doubt the bond's authenticity as it dealt with the defendant in good faith and was entitled to assume all acts of internal management on the defendant's part concerning the issuance of the bond had been validly performed.

Held, dismissing the claim wth costs:

(1) The bond was a false document. The plaintiff bore the burden of proving it was genuinely issued by the defendant and it should have called Sulaiman Abdul Razak as a witness. The court could not infer that the signature on the (verification) letter was Sulaiman Abdul Razak's as no evidence was tendered as to who had written the letter. As a result, the maker of the document was not established. As against this, DW1's evidence that the bond was not a genuine document issued by the defendant was clear and uncontroverted. It was not put to him in cross-examination that the document was genuine. It was also evident from a perusal of the document that it bore no letterhead whatsoever (see paras 25–27).

(2) There was no evidence to show the defendant had conducted itself in any manner or made any representation to suggest the bond was genuine. The defendant was therefore not estopped from setting up forgery in answer to the plaintiff's claim. Through DW1, the defendant, in fact, established that Sulaiman Abdul Razak had no authority to issue a bond for such a sum. Even assuming he was the maker of the bond, the plaintiff failed to show he had ostensible authority to bind the defendant. It was not the plaintiff's pleaded case that the defendant had represented or held out that its branch managers had such authority or that they issued such bonds in the ordinary course of their duties. The verification letter purportedly issued by Sulaiman Abdul Razak did not assist the plaintiff as it was not a representation emanating from the principal, ie the defendant, but one which emanated from the 'fraudulent' agent himself. Hence, the requirements for the principle of ostensible authority to operate were not met (see paras 41–42).

(3) The defendant's 'silence' was entirely due to the fact it had no knowledge of the fraud at the material time. Only silence in the face of knowledge of a wrongful act on the part of its employees or any act or representation to the effect that the document was genuine could preclude the defendant from relying on forgery to meet the plaintiff's claim. There was no 'knowing silence' or such act or representation on the defendant's part in the instant case. The doctrine of estoppel therefore had no application (see para 44).

(4) The plaintiff could not invoke Turquand's Rule to affix liability on the defendant by reason of the fraudulent nature of the bond. The plaintiff

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ought to have been put on inquiry by the significant discrepancies and irregularities that were evident on the face of the bond (see paras 52 & 56).

[Bahasa Malaysia summary

Plaintif memohon untuk menguatkuasakan sesuatu bon bayaran pendahuluan ('bon') untuk RM10 juta kononnya dikeluarkan oleh defendan tidak boleh dimansuhkan menjamin tuntutan pembayaran plaintif daripada jumlah wang itu. Berdasarkan bon tersebut plaintif mendahulukan bayaran sebanyak RM10 juta kepada kontraktor untuk melaksanakan kerja projek tersebut. Plaintif menerima bon tanpa persoalan walaupun dokumen itu menzahirkan beberapa percanggahan yang ketara pada zahirnya – ia mengandungi tandatangan pengurus terdahulu ('Sulaiman Abdul Razak') cawangan defendan; dokumen itu tidak mengandungi apa-apa kepala surat, apatah lagi kepala surat syarikat defendan; ia telah ditandatangani di hadapan pesuruhjaya sumpah; butiran kontrak antara plaintif dan kontraktor telah salah dinyatakan di dalam bon; terdapat dua tarikh yang berbeza pada bon dan kesahihan bon telah disahkan hanya oleh Sulaiman Abdul Razak sendiri melalui satu surat. Berikutan penamatan kontrak kontraktor plaintif untuk keingkaran dan kegagalan untuk mendapatkan balik apa-apa bahagian bayaran pendahuluan yang dibuat, plaintif memohon pembayaran penuh di bawah bon. Defendan menafikan liabiliti itu, antara lain, bahawa ia tidak mengeluarkan bon dan bahawa walaupun dokumen itu telah ditandatangani oleh Sulaiman Abdul Razak, dia tidak mempunyai kuasa sebenar atau zahir untuk mengeluarkan surat seperti itu untuk mengikat defendan. Defendan juga menegaskan memandangkan percanggahan serius jelas pada bon itu, plaintif sepatutnya tidak menerimanya dan sepatutnya membuat siasatan. Defendan berhujah bahawa ia adalah untuk plaintif membuktikan bahawa bon adalah tulen kerana tidak ada bukti dokumen itu sebenarnya ditandatangani oleh Sulaiman Abdul Razak yang tidak dipanggil sebagai saksi. Sebaliknya, plaintif menegaskan bahawa Sulaiman Abdul Razak tidak mempunyai kuasa zahir untuk bertindak bagi pihak defendan dan defendan telah diestop dari menafikan kesahihan dan nilai bon. Plaintif juga bergantung kepada Peraturan Turquand ('indoor Management Rule') untuk mengatakan ia tidak mempunyai sebab untuk meragui kesahihan bon kerana ia berurusan dengan defendan dengan niat baik dan berhak untuk menganggap semua tindakan pengurusan dalaman di pihak defendan berhubung dengan pengeluaran bon itu telah dilakukan secara sah.

Diputuskan, menolak tuntutan dengan kos:

(1) Bon itu adalah dokumen palsu. Plaintif menanggung beban membuktikan ia benar-benar dikeluarkan oleh defendan dan ia sepatutnya memanggil Sulaiman Abdul Razak sebagai saksi. Mahkamah tidak boleh membuat kesimpulan bahawa tandatangan (pengesahan) pada surat adalah tandatangan Sulaiman Abdul Razak kerana tidak ada

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bukti yang dikemukakan untuk siapakah surat tersebut ditulis. Oleh itu, pembuat dokumen itu telah tidak dibuktikan. Berlawanan dengan itu, keterangan DW1 bahawa bon bukan satu dokumen tulen yang dikeluarkan oleh defendan adalah jelas dan tidak bercanggah. Ia tidak diterangkan kepada DW1 sewaktu pemeriksaan balas bahawa dokumen itu adalah tulen. Ia juga terbukti daripada semakan ke atas dokumen itu bahawa ia tidak mempunyai apa-apa kepala surat (lihat perenggan 25–27).

(2) Tidak ada bukti yang menunjukkan defendan telah melakukan sendiri dalam apa-apa cara atau membuat apa-apa representasi yang mencadangkan bon adalah tulen. Defendan oleh itu, tidak diestop dari membangkitkan pemalsuan bagi menjawab tuntutan plaintif. Melalui DW1, defendan, sebenarnya, telah membuktikan bahawa Sulaiman Abdul Razak tidak mempunyai kuasa untuk mengeluarkan bon bagi jumlah wang sebegitu. Dengan menganggap dia adalah pembuat bon, plaintif gagal menunjukkan dia mempunyai kuasa zahir untuk mengikat defendan. Ia bukan kes diplid oleh plaintif bahawa defendan telah merepresentasi atau menyatakan bahawa pengurus cawangannya mempunyai kuasa atau bahawa mereka mengeluarkan bon itu dalam perjalanan biasa tugas mereka. Surat pengesahan yang kononnya dikeluarkan oleh Sulaiman Abdul Razak tidak membantu plaintif kerana ia bukan satu perwakilan berasal daripada prinsipal, iaitu defendan, tetapi berpunca daripada ejen 'fraudulent' sendiri. Oleh itu, syarat untuk prinsip kuasa zahir untuk beroperasi tidak dipenuhi (lihat perenggan 41–42).

(3) Sikap 'berdiam diri' defendan adalah sepenuhnya kerana fakta ia tidak mempunyai pengetahuan tentang pemalsuan pada masa material. Hanya berdiam diri kerana mempunyai pengetahuan tentang perbuatan salah di pihak pekerja atau apa-apa perbuatan atau representasi yang bermaksud bahawa dokumen itu adalah tulen boleh menghalang defendan itu daripada bergantung pada pemalsuan untuk memenuhi tuntutan plaintif. Tidak ada 'knowing silence' atau tindakan atau representasi di pihak defendan dalam kes ini. Doktrin estopel oleh itu tidak terpakai (lihat perenggan 44).

(4) Plaintif tidak boleh menggunakan Peraturan Turquand untuk meletakkan liabiliti kepada defendan dengan sebab sifat semula jadi penipuan bon. Plaintif sepatutnya telah membuat siasatan berkaitan dengan percanggahan dan penyelewengan yang ketara yang terdapat pada bon (lihat perenggan 52 & 56).]

Notes

For a case on forgery, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) para 4994.

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Cases referred to

A-G for Ceylon v Silva [1953] AC 461, PC (refd)
British Bank of the Middle East v Sun Life Assurance Co of Canada (UK) Ltd [1983] 2 Llyod's Rep 9, HL (consd)
Internatonal Trading Co v Chan Chow Kian [1970] 1 MLJ 192, FC (refd)
Kreditbank Cassel GmbH v Schenkers, Ltd, and Others [1927] 1 KB 826, CA (refd)
Negara Traders Ltd v Pesuroh Jaya Ibu Kota, Kuala Lumpur [1969] 1 MLJ 123 (refd)
Northside Developments Pty Ltd v Registrar-General (1990) 170 CLR 146, HC (refd)
Pan-Electric Industries Ltd (in liquidation) v Oversea-Chinese Banking Corp Ltd & Anor [1994] 3 SLR 695, CA (refd)
Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors [1998] 1 MLJ 465, FC (refd)
Rolled Steel Products (Holdings) Ltd v British Steel Corpn [1986] Ch 246, CA (refd)
Royal British Bank v Turquand (1856) 6 E & B 327 (refd)
Ruben and Ladenburg v Great Fingall Consolidated [1906] AC 439, HL (consd)
Yee Ah Fern v Alliance Bank Malaysia Bhd [2010] 7 MLJ 547, HC (refd)

Irene Tan Ai Ling (Haslinda Ikmar with her) (Legal Counsel Office, Ministry of Works) for the plaintiff.
Sean Yeow (Aric Wong with him) (Lee Hishammuddin Allen & Gledhill) for the defendant.

Nallini Pathmanathan J:

INTRODUCTION

[1] By this action the plaintiff, the Government of Malaysia ('the plaintiff') seeks to enforce what is in effect a demand guarantee, commonly known as an advance payment bond ('advance payment bond') in the sum of Ringgit Malaysia Ten million (RM10,000,000). Such a bond or guarantee is commonly utilised in the construction industry. It is used primarily to secure advance payments made by the employer to the contractor. Such advances made to the contractor are repaid by deductions from the contract sum progressively paid to the contractor. If there is default on the part of the contractor before the monies advanced to it are fully repaid, then the employer will call on the advance payment bond to recover the balance sum or full sum as the case may be.

[2] In the instant case, the plaintiff, as employer, maintains that an advance payment bond was issued by the defendant, RHB Insurance Bhd ('the

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defendant') in its favour pursuant to a request by its contractor, one Ibai Bina Sdn Bhd. The defendant is a general insurance company.

[3] The defendant on the other hand, maintains that the advance payment bond is a false document which it did not issue. On a perusal of the document purporting to be issued by the defendant, it appears that the advance payment bond was issued by the then Kota Bharu branch manager of the defendant. As such the defendant further contends that it did not expressly nor ostensibly authorise the issue of any such document. As such the defendant maintains that the said payment bond is not binding on it, and that it has no liability to make payment in respect of the said bond.

[4] The liability or otherwise of the defendant under this impugned document, namely the advance payment bond, comprises the central issue for adjudication in this case.

THE SALIENT BACKGROUND FACTS

[5] The salient facts are gleaned primarily from the summary of facts submitted by learned counsel for the plaintiff and the defendant.

[6] The plaintiff is the employer in respect of a project known as 'Projek Jalanraya Simpang Pulai - Lojing Gua Musang - Kuala Berang, Pakej 6A: Dari Airing ke Sempadan Kelantan/Terengganu' ('the project').

[7] The plaintiff appointed the aforesaid Ibai Bina Sdn Bhd ('Ibai Bina') as the contractor of the project. The contract sum for the said project was RM103,483,230.24. To this end, on 29 March 2006 the plaintiff and Ibai Bina entered into contract No JKR/IP/CKUB/99/2005 ('the contract') in respect of the project.

[8] One of the conditions of the contract was that the contractor should provide an advance payment bond in the sum of RM10m. Ibai Bina submitted a guarantee in favour of the plaintiff in the said sum, alleging that it had been issued by the defendant. It took the form of an insurance guarantee for advance payment No D05APB2401142KB for RM10m dated 13 December 2005. This guarantee bears a signature which purports to be that of the then manager of the Kota Bharu Branch of the defendant. This advance payment bond was stated to be valid until 14 November 2007.

[9] The conditions of this advance payment bond provide that the defendant irrevocably undertakes and guarantees to pay the plaintiff the sum of RM10m upon written demand by the plaintiff notwithstanding any contestation or protest by the contractor or any third party. In short the

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document appears to be an irrevocable and continuing guarantee to pay the said sum until the date of lapse, ie 14 November 2007.

[10] It is evident from a perusal of the said document that:

(a) it bears a signature and underneath that signature, the stamp of one Sulaiman Abdul Razak the then branch manager of the defendant's Kota Bahru Branch. In this context it is not in dispute that Sulaiman was then the branch manager there. His services were subsequently terminated;

(b) the advance payment bond is not on the letterhead of the defendant. There is simply no letterhead whatsoever;

(c) the date of the advance payment bond is not clear. This is because the document is dated 15 November 2005. However it also appears to have been stamped before a commissioner for oaths and the date of that stamp is 12 December 2005, almost a month later;

(d) it is extraordinary for such a bond or performance guarantee to be executed before a commissioner for oaths;

(e) the details of the government contract stipulated in the advance payment bond differ from the correct description of the contract; and

(f) the authenticity of the advance payment bond was verified by the author of the document, namely Sulaiman Abdul Razak himself on 14 December 2005 by way of a letter to that effect. There was no independent verification undertaken or sought by the plaintiff.

[11] The advance payment bond was accepted by the plaintiff. The plaintiff then proceeded to make the advance payment of RM10m to the contractor, Inai Bina Sdn Bhd.

[12] Subsequently Inai Bina Sdn Bhd defaulted on its contract and the plaintiff terminated it as the contractor of the project on 21 September 2006. This termination had occurred before the plaintiff could recoup any part of the advance payment it had made to Inai Bina Sdn Bhd

[13] The plaintiff despite the earlier termination, issued a letter some time later, ie on 22 December 2009 to Inai Bina Sdn Bhd stipulating that the termination was based on the mutual understanding of both parties, ie the plaintiff and the contractor.

[14] The plaintiff issued letters dated 9 October 2006, 26 January 2007, 12 November 2007, 25 August 2008 and 24 December 2009 seeking payment under the advance payment bond in the sum of RM10m. The defendant maintains that it never received the plaintiff's letters of 9 October 2006, 26

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January 2007 or 12 November 2007. It admits however receiving the plaintiff's letter of 24 December 2009. It duly responded on 18 January 2010 specifying that it had no record of the issuance of any such advance payment bond in its records. The defendant also sought further particulars in relation to this document to enable it to investigate the matter further.

[15] The defendant did not respond further to the plaintiff. Its case is that the advance payment bond is a falsified document which is not binding on the plaintiff. As such the defendant denies issuing the same. Further or alternatively, the defendant maintains that even if the advance payment bond was signed by Sulaiman bin Abdul Razak, no liability accrues to the defendant because:

(a) Sulaiman Abdul Razak, the then branch manager of the defendant had no actual or ostensible authority to issue any such bond or performance guarantee. As such his act is not binding on the defendant; and

(b) the plaintiff was put on inquiry by the serious discrepancies that were evident on the face of the advance payment bond and ought not to have accepted the same. As such the plaintiff is precluded from enforcing as against the defendant the falsified advance payment bond.

[16] As a further plank to its defence, the defendant contends that:

(a) the demand on the advance payment bond was not made in the course of its validity period; and

(b) the plaintiff failed to make the requisite deductions for this advance payment from the substitute contractor that replaced Inai Bina Sdn Bhd, namely one Redland Construction Sdn Bhd. The latter entity had agreed to undertake the liability of RM10m in respect of the advance payment bond issued by Inai Bina Sdn Bhd in its letter of offer to the plaintiff. The plaintiff however failed to act on the same. Redland is now in liquidation. In these circumstances it is contended that the failure to deduct the sums due under the earlier contract with Inai Bina is entirely attributable to the plaintiff.

[17] Sulaiman Abdul Razak's services as branch manager were terminated some years ago. The defendant has no knowledge of his whereabouts.

THE TRIAL

[18] The trial of this matter took place over the course of less than a day. Each party called one witness. The plaintiff called Hasnan bin Ismail whose designation is *penolong pengarah kanan*, Unit Projek Khas, Cawangan Jalan, Ibu Pejabat JKR, ('PW1') while the defendant called one Richard Chen Chee

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Hoong, DW1, who was at the material time the head of the underwriting department of the defendant ('DW1').

ISSUES

[19] The parties concurred that the issues that arose for adjudication by this court are as follows:

(a) the authenticity or falsity of the advance payment bond;

(b) the ostensible authority of Sulaiman Abdul Razak, the defendant's ex branch manager and employee, and whether it was such as to bind the defendant;

(c) the effect of Turquand's Rule.

Issue (i): The authenticity or falsity of the advance payment bond

[20] Learned counsel for the plaintiff submitted that the advance payment bond is a genuine document because the plaintiff received it from Inai Bina Sdn Bhd in good faith. The plaintiff also relies on the verification letter issued by Sulaiman bin Abdul Razak dated 14 December 2005 in establishing its authenticity.

[21] It was further submitted that it was incumbent upon the defendant to establish the falsity of the advance payment bond.

[22] The defendant in reply pointed to the fact that there was no evidence before this court that the advance payment bond was in fact signed by Sulaiman Abdul Razak, as he had not been called as a witness, and no attempt to do so had been made. The defendant further maintained that as it was the plaintiff that alleged that the advance payment bond is a genuine document authorised by the defendant, it was the plaintiff who ought to have called Sulaiman as a witness (see *Yee Ah Fern v Alliance Bank Malaysia Bhd* [2010] 7 MLJ 547 at p 556).

[23] Secondly, the defendant points to DW1's evidence, which was neither rebutted nor shaken to the effect that the advance payment bond was not a genuine document issued by the defendant. He went on to state that the defendant has never issued an advance payment bond and that the impugned document did not bear the defendant's letterhead.

[24] Thirdly the defendant maintained that the fact that the plaintiff received the advance payment bond in good faith does not make the document a genuine one.

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[25] Having considered the competing submissions it appears to this court that it is indeed the plaintiff who bears the burden of proof in relation to the advance payment bond. Sulaiman bin Abdul Razak ought to have been called by the party seeking to rely on the advance payment bond as a genuine document, ie the plaintiff. The court cannot make the inference that the signature on the letter must be that of Sulaiman bin Razak just because his name is written below the alleged signature. This is particularly so when there is no evidence tendered as to who had written the letter. There is therefore a clear lacuna in terms of establishing the identity of the author of the advance payment bond.

[26] As against this, DW1's evidence was clear and uncontroverted, namely that the advance payment bond was not a genuine document that had been issued by the defendant. It was not put to him in the course of cross-examination that the advance payment bond was in fact a genuine document. It is also evident from a perusal of the document that it indeed bears no letterhead whatsoever.

[27] In summary therefore, the plaintiff produced no evidence save for the impugned document in seeking to establish that it was a genuine or authentic document issued by the defendant. The maker of the document, purportedly Sulaiman Abdul Razak was not called. As a consequence, the maker of the document was not established. When weighed against DW1's clear evidence that the document is false it appears to this court that the latter conclusion clearly outweighs the plaintiff's claim that it is a genuine document. I have no hesitation in concluding that the advance payment bond is indeed a false document.Indeed the manner in which this entire case proceeded was on the basis that the advance payment bond is a false document but that the defendant is nonetheless bound by it by reason of ostensible authority and the application of Turquand's Rule. This brings us to the second issue that falls for adjudication.

Issue (ii): The ostensible authority of Sulaiman Abdul Razak, the defendant's ex branch manager and employee, and whether it was such as to bind the defendant ostensible authority

[28] The plaintiff maintained that the defendant was bound by the act of its ex employee, the branch manager, Sulaiman Abdul Razak by virtue of the doctrine of ostensible authority. In principle the contention was that as a branch manager, Sulaiman had been held out by the defendant as having possessed the requisite authority to issue an advance payment bond for a sum of RM10m on behalf of the defendant. In support of this contention, the plaintiff relied on the English Court of Appeal case of *Rolled Steel Products (Holdings) Ltd v British Steel Corpn* [1986] Ch 246 (*Rolled Steel* case) for the

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proposition that a company holds out its directors as having ostensible authority to bind the company to any transaction which falls within the powers conferred by the memorandum of association. As such a person dealing in good faith with the company carrying on an intra vires business is entitled to assume that the directors are properly exercising such powers for the purposes of the company as set out in the memorandum unless he is put on notice to the contrary.

[29] It was also contended for the plaintiff that estoppel came into play to preclude the defendant from denying the efficacy of the advance payment bond. In this context it was contended that the defendant by its inaction represented to the plaintiff that its agent, Sulaiman had the requisite authority to issue an advance payment bond. As a consequence, the plaintiff altered its position for the worse as a consequence of which, it is contended, the defendant is precluded from disputing as against the plaintiff that Sulaiman was vested with the requisite authority to issue such a document, at the relevant time. In support of this proposition the plaintiff relied on the exposition on the application of estoppel in relation to commercial contracts as stated by Lai Kew Chai J in the Singapore case of *Pan-Electric Industries Ltd (in liquidation) v Oversea-Chinese Banking Corp Ltd & Anor* [1994] 3 SLR 695 at pp 705–706 where the learned judge quoted from 'The Law Relating to Estoppel by Representation by Spencer and Tunner (3rd Ed 1977)' at para 181.

[30] In summary therefore, the plaintiff sought to contend that Sulaiman was clothed with ostensible authority and further that the defendant is estopped by its silence from denying that Sulaiman was clothed with the requisite authority to issue the advance payment bond.

[31] Learned counsel for the defendant responded by setting out the position in law in relation to ostensible authority. For ostensible authority to 'bite' as it were, there must be a representation by the defendant of Sulaiman's authority to issue the advance payment bond. In this context reference was made to *Internatonal Trading Co v Chan Chow Kian* [1970] 1 MLJ 192, a decision of the Federal Court where Ong CJ quoted from the judgment of the Privy Council in *A-G for Ceylon v Silva* [1953] AC 461:

> ... All 'ostensible' authority involves a representation by the principal as to the extent of the agent's authority. No representation by the agent as to the extent of his authority can amount to a 'holding out' by the principal.

[32] It was submitted for the defendant that there is no evidence whatsoever before this court that there was in fact any form of representation by the defendant as to the extent of Sulaiman's authority. In fact there was no representation at all in respect of Sulaiman's authority.

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[33] The defendant distinguished the *Rolled Steel*'s case maintaining that that was a case where a director was held to have ostensible authority. In the instant case Sulaiman is not a director. Learned counsel for the defendant maintained that if one of the directors of the defendant had signed or issued the advance payment bond then that might have accorded the plaintiff some basis to claim ostensible authority. But there was no such incident here.

[34] More importantly the defendant points to the fact that there was simply no representation at all emanating from the defendant which is a pre requisite for the purposes of establishing ostensible authority. It was again highlighted that in order for the plaintiff to even maintain ostensible authority it was incumbent upon the plaintiff to show that it was in fact Sulaiman who had signed the letter. But this had not been done.

[35] The defendant further submitted that there is no evidence before the court that a branch manager in an insurance company is clothed with such ostensible authority. The evidence that was in fact adduced in court by the defendant establishes that all such high value bonds, such as the impugned advance payment bond in the sum of RM10m, are signed by the principal officer of the insurance company, ie the chief executive officer. It was therefore untenable to maintain that a branch manager could have the authority, express or ostensible to issue such a high value guarantee.

[36] In support of this reliance was placed on *Kreditbank Cassel GmbH v Schenkers, Ltd, and Others* [1927] 1 KB 826. In that case the defendants whose business was that of forwarding agents, had a branch at Manchester under a branch manager who, without having received any authority from the defendants, and acting in fraud of them drew seven bills purporting to do so on the company's behalf. The bills were duly dishonoured by the acceptors and the plaintiffs sought to sue the defendants as drawers of these bills. In these circumstances the English Court of Appeal held that the defendants were not liable on the bills in the face of the forgery. Significantly it was held that in the absence of evidence it could not be assumed or inferred that the manager of a branch business is a person who has ostensible authority to sign bills on behalf of his company. This is what Atkin LJ held:

> ... Much depends, of course upon the evidence as to the nature of the business and actual position occupied by the particular person. But in the absence of evidence I am not prepared to hold that the manager of a provincial branch, even if he is in such an important position as manager of the Manchester branch of a forwarding agency, has authority to draw bills to bind the company. The actual evidence in this case was that the company never signed bills at all, and in the absence of evidence that the person ahs ostensible authority to draw bills I should think that he plainly has not the authority to do so. Therefore, we have the ordinary case of a person having purported to exercise an authority to bind the company in fraud of the company outside the scope of his ordinary ostensible authority.

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[37] This line of reasoning was adopted in *Negara Traders Ltd v Pesuroh Jaya Ibu Kota, Kuala Lumpur* [1969] 1 MLJ 123 by Raja Azlan Shah J. In that case the plaintiffs sold and delivered certain goods to the defendants through the office messenger. The orders had been forged by the office messenger and the defendants never received the goods. The forged orders were on the official forms of the defendants and were duly signed and stamped. The plaintiff sought to recover the price of the goods on the principle of ostensible authority. The defendants had no previous dealings with the plaintiff. It was not the duty of the office messenger to issue local orders. The court held that the issue of ostensible authority vis a vis the office messenger simply did not arise:

> ... The defendants had never conducted themselves in any manner or done anything to represent or lead the plaintiffs to the belief that those transactions were their deeds. Without such representation there can be no estoppel. There was no evidence in this case upon which an estoppel can be founded. The plaintiffs are then driven to rely, if they can upon the ordinary rule applicable in the case of principal and agent. If they can show that the preparation and authentication of those orders were within the ostensible authority of the person occupying the position which this office messenger occupied, there might have been a claim founded upon this ground. There was no such evidence. Indeed it was proved that it was not part of the office messenger's duties to issue local orders ...
>
> ...
>
> In my opinion the fact that those orders were forgeries cannot give them the efficacy which they do not intrinsically possess. The office messenger, who is a mere servant, may be the proper person to present (personally) those orders which the defendants might in due course issue, but he can have no authority to guarantee the genuineness or validity of the documents which are not the deeds of the defendants ...

[38] A further relevant case is that of *British Bank of the Middle East v Sun Life Assurance Co of Canada (UK) Ltd* [1983] 2 Llyod's Rep 9 where the House of Lords had an occasion to consider whether ostensible authority as a doctrine could be invoked to bind Sun Life Assurance Co in respect of an undertaking signed by a unit manager of the city branch of the assurance company. In this case the insurance company not only carried on the business of life assurance but also the further business of mortgages on real property. The plaintiff there, the British Bank of the Middle East had advanced money to a firm of property dealers by way of short term loans. These property dealers bought dilapidated properties, converted them into residential flats and sold or let them to private individuals. Under the terms of the loan agreements there was provision for the defendant, ie Sun Life Assurance to undertake to repay to the plaintiff bank, specific sums advanced by the plaintiff bank to the property dealers. Such repayment was to be made on the sale of the property or on a specific date some two years after the advance. In short it comprised a guarantee or assurance of payment of monies advanced to a third party. It bears a striking resemblance to the instant case.

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[39] These undertakings purportedly issued by the defendant Sun Life Assurance were signed by a unit manager of the city branch of the defendant. However such undertakings had to be executed on behalf of the defendant by duly authorised representatives. To this end a query was made by the plaintiff of the writer's authority to issue such an undertaking on behalf of the defendant. A reply was received from a branch manager of the defendant assurance company confirming that the signature on the undertaking letter was duly authorised to do so. It is immediately apparent that the foregoing case is better positioned than the current case before this court because there was an attempt to independently verify the authority of the person providing the undertaking. Here the verification was provided by the very author of the fraudulent advance payment bond.

[40] In any event in *British Bank v Sun Life* the House of Lords held unanimously that the undertaking was not binding on Sun Life UK and could not be enforced against it. It was stated that the verification provided by the branch manager was unacceptable as he did not possess the actual authority express or implied of the Sun Life Assurance to provide such verification. It was pointed out that there was no representation by Sun Life Assurance that the original author possessed the requisite authority to issue the undertaking. Instead it was a case of the branch manager without the knowledge or authority of Sun Life UK holding himself out as having such authority. In these circumstances it was held that the contention of ostensible authority was not made out.

[41] In like manner in the instant case there is no evidence before this court which shows that the defendant conducted itself in any manner or made any representations which might even suggest that the advance payment bond was a genuine document. Neither has the plaintiff been able to show that the preparation and issuance of such an advance payment bond in the sum of RM10m fell within the scope of duty or ostensible authority of a branch manager such as Sulaiman Razak. The defendant, in fact, has established through DW1 and the authority limits of branch managers, that Sulaiman Razak, if indeed he is the author of the advance payment bond, had no such authority to issue bonds in such sums. In short, assuming that Sulaiman Razak is the maker of the advance payment bond which is a false document, the plaintiff has failed to establish ostensible authority on his part which has the effect of binding the defendant. Neither can it be said that the defendant by its own act or conduct is estopped from maintaining that the advance payment bond is fraudulent. In other words the defendant did not conduct itself in any manner nor indulged in any representation which precludes it from setting up the forgeries in answer to the plaintiff's claim.

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[42] In this context the verification letter purportedly issued by Sulaiman Abdul Razak does not assist the plaintiff's case as it is in effect a representation emanating directly from the 'fraudulent' agent himself, and not the principal, ie the defendant. It does not therefore satisfy the requirements of the principle of ostensible authority that are to be met before a principal can be said to be bound by the acts of its agent. There must be a representation by the defendant, and not Sulaiman Abdul Razak himself, which is not the case here, as there is no such evidence.

[43] It is also pertinent that in the instant case the plaintiff has not pleaded that the defendant represented or held out that the defendant's branch manager had such authority. Neither is it the pleaded case of the plaintiff that branch managers of the defendant or insurance companies issued advance payment bonds in the ordinary course of their duties.

ESTOPPEL

[44] With respect to the plaintiff contention that estoppel lies against the defendant is, with respect, misconceived. The defendant, 'silence' as it were is entirely due to the fact that it had no knowledge of the fraud at the material time. It is only silence in the face of knowledge of a wrongful act on the part of its employees or any act or representation to the effect that the document was a genuine document that would preclude the defendant from relying on the forgery to meet the plaintiff's claim. There is no such act or representation or knowing silence on the part of the defendant in the instant claim. The doctrine of estoppel in favour of the plaintiff is not therefore invoked.

[45] In fact it is curious that the plaintiff itself failed to be put on notice by the clear irregularities that are apparent on a perusal of the advance payment bond and which I have detailed at the outset. It begs the question of whether there was sufficient or any adequate scrutiny of the foreged document when it was handed over to the plaintiff. The absence of the defendant's letterhead, the mistakes in the document, the fact that the document contained two different dates and had been affirmed before a commissioner of oaths (on a different date) are glaring issues that ought to have put the plaintiff on notice.

[46] The fact that these irregularities are substantive is borne out by the testimony of PW1 who accepted, in the course of cross-examination that if such a document were tendered now to him as guarantee of the payment of RM10m he would not accept it.

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PW1's cross-examination

Q: Memandangkan pencanggahan tersebut, adakah Encik Hasnan akan menerima Jaminan ini pada hari ini?

A: Terima.

Q: Terima juga? Walaupun pencanggahan?

A: Kalau kita tahu, tak akan terima.

Q: Sekarang kita tahu. Jika sekarang saya bagi Jaminan ini kepada Encik Hasnan, Encik Hasnan akan bagi saya RM10 juta? Dengan 2 mukasurat ini, sebagai sekuriti?

A: Tak, tidak akan bagi.

Q: Akan tolak Jaminan ini?

A: Betul.

PW1's re-examination

Q: Tadi Encik Hasnan menjawab kepada soalan rakan bijaksana saya yang mengatakan sekiranya, ababila melihat kepada pencanggahan-pencanggahan tersebut Encik Hasnan tidak akan terima Jaminan Insuran ini, setahu pencanggahan-pencanggahan tersebut di ketahui.

A: Betul.

Q: Tetapi Encik Hasnan, sekiranya Encik Hasnan merujuk hanya kepada mukasurat 149-150, pada Jaminan Insuran tersebut, adakah Encik Hasnan akan menerima Jaminan tersebut?

A: Jaminan itu sahaja?

Counsel: Ya

A: Tidak. Tidak akan menerima.

Issue (iii): The effect of Turquand's Rule

[47] The third issue that arises for adjudication is the plaintiff's contention that by reason of the operation of the doctrine in Turquand's Rule or the Indoor Management Rule, it is entitled to assume that acts within the company's constitution and powers have been properly performed. In this context it is contended that the plaintiff here dealt with the defendant in good faith in

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relation to the advance payment bond and as such it is not bound to inquire whether acts of internal management have been regular. Reliance is placed on *Royal British Bank v Turquand* (1856) 6 E & B 327 as accepted by the Federal Court in *Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors* [1998] 1 MLJ 465. In the latter case it was explained by the Federal Court as follows at p 506:

> ... At this point, would interpolate to observe that the effect of the rule in *Turqand*'s case is that it reduces the enquiries which outsiders having dealings with a company – or more correctly outsiders who reasonably think they are having dealings with a company – must make, which of course promotes business convenience. Such outsiders have no right to insist on proof by the company's directors that the provisions of its memorandum or articles have been complied with, and they cannot therefore be deemed to have constructive notice of some failure to comply which they have no means of discovering (*County of Gloucester Bank v Rudry Merthyr Steam and House Coal Colliery Co* [1895] 1 Ch 629 at p 636, per Lindley LJ) and it is this which provides the legal basis for the rule.
>
> In *Turqand*, the deed of settlement (corresponding to the modern articles of association) had given permission to borrow subject to a general resolution of the company authorising the same. The bank had lent money to the company upon the security of a bond signed by two directors and given under the seal of the company. In an action brought by the bank to recover the money lent, the company had contended that no resolution of the kind required had been passed. In reply the lender relied on the usual authority of directors. The Court of Exchequer Chamber held that the lender was entitled to succeed; this was because the company was bound by the contract since the bank was entitled to infer that the necessary resolution had been passed.

[48] The plaintiff contends, in reliance upon the foregoing, that it did not doubt the authenticity of the insurance guarantee for the following reasons:

(a) the advance payment bond had been signed by the then branch manager of the defendant in Kota Bharu, Kelantan;

(b) the plaintiff could in no circumstances have knowledge about the risk acceptance limit of the branch manager which is an internal arrangement in the defendant; and

(c) Sulaiman Razak had verified the authenticity of the insurance guarantee by, inter alia, issuing it with his signature and the defendant company's rubber stamp on the document. And secondly by providing independent verification of the authenticity of the document.

[49] The defendant meets this argument by pointing out that Turquand's Rule has no application to falsified documents. The case of *Ruben and Ladenburg v Great Fingall Consolidated* [1906] AC 439 cited in support. The facts of that case were that the appellants there had advanced in good faith a sum of money to the secretary of the respondent company for his own purposes

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on the security of a share certificate of the company issued to them by him certifying that the appellants were registered in the company's register of shareholders as transferees of shares. The certificate itself was in accordance with the company's articles of association, bore the seal of the company and appeared to be signed by two of the directors and counter-signed by the secretary. However this had all been done fraudulently by the secretary and without authority and the signatures of the two directors had been forged by him. When the respondents sought to be registered as shareholders the appellants refused to do so. As such the respondents brought an action against the company for damages for refusing to so register the appellants as owners of the shares. In these circumstances Lord Lordburn held, inter alia, as follows:

> I cannot see upon what principle Your Lordships can hold that the defendants are liable in this action. The forged certificate is a pure nullity. It is quite true that persons dealing with limited liability companies are not bound to inquire into their indoor management, and will not be affected by irregularities of which they had no notice. But this doctrine, which is well established, applies only to irregularities that otherwise might affect a genuine transaction. It cannot apply to a forgery.

[50] And further on at p 444 Lord Macnaghten explained as follows:

> The thing put forward as the foundation of their claim is a piece of paper which purports to be a certificate of shares in the company. This paper is false and fraudulent from beginning to end. The representation of the company's seal which appears upon it, though made by the impression of the real seal of the company, is counterfeit, and no better than a forgery. The signatures of the two directors which purport to authenticate the sealing are forgeries pure and simple. Every statement in the document is a lie. The only real about it is the signature of the secretary of the company, who was the sole author and perpetrator of the fraud. No one would suggest that this fraudulent certificate could of itself give rise to any right or bind or affect the company in any way. It is not the company's deed, and there is nothing to prevent the company from saying so.
>
> Then how can the company be bound or affected by it? The directors have never said or done anything to represent or lead to the belief that this thing was the company's deed. Without such a representation there can be no estoppel.

[51] These same passages were relied upon in *Kreditbank Cassel GmbH v Schenkers, Ltd, and Others* in concurring that the Indoor Management Rule had no application in relation to fraud.

[52] It is clear from the foregoing, and I accept that the Indoor Management Rule can afford no answer to the plaintiff in the instant case in the face of the forgery that is the advance payment bond. The application of Turquand's Rule as applied in *Pekan Nenas* cannot be invoked to affix liability on the defendant by reason of the fraudulent nature of the advance payment bond.

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[53] The plaintiff sought to argue further that the forgery exception to Turquand's Rule or the Indoor Management Rule had limited application and only applied to forgery in a 'strict sense'. Reliance was placed on *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146. In that case the High Court of Australia stated thus:

> ... To the extent to which Lord Loreburn's comment reflected the view that an act could not be within the scope of the authority of a servant or agent if it was done fraudulently and for his own benefit and not for that of the employer or principal, that view was undermined by the later decision of the House of Lords in *Lloyd v Grace Smith & Co* [1912] AC 712. Despite this, subsequent cases contain statements that forgery is an exception to the rule in *Turqand*'s case: *Kreditbank Cassel GmbH v Schenkers, Ltd* [1927] 1 KB 826, at 835, 839–840, 844; *South London Greyhound Racecourses Ltd v Wake* [1931] 1 Ch 496, at 507. However in *Uxbridge Permanent Benefit Building Society v Pickard* [1939] 2 KB 248, the Court of Appeal held that a solicitor was liable for the fraud of his managing clerk even though the fraud of the managing clerk involved forgery. It may be, as *Gower*'s *Principles of Modern Company Law*, 4th ed (1978) suggest (pp 204–5), that forgery is not a true exception to the rule in *Turquand*'s case and that the cases are capable of explanation on the footing either that the forged document was not put forward as genuine by an officer acting within the scope of his actual or apparent authority or that the third party was put on inquiry: see *Pickard*'s case, per MacKinnon LJ at 258. For the purposes of the present case it is not necessary to resolve this question because it will be possible to decide the case on the basis that forgery is not an exception to the rule. However it will become apparent from what follows later in these reasons that, if there is a forgery exception, it has a limited area of operation.
>
> The application of the rule was relatively straightforward in cases in which an officer of a company exercised a power or authority which was susceptible of delegation under the articles of association. Notwithstanding that the officer was in fact exceeding his authority, the company was bound by his act, unless the person dealing with the company knew that the officer lacked the requisite authority or the circumstances were such as to put that person upon inquiry: *Houghton and Co v Nothard, Lowe and Wills Ltd* [1927] 1 KB 246 ...

[54] The foregoing exposition highlights the fact that it is not in every instance of forgery that a company is exempt from liability. It makes reference to cases where a company has been found liable as principal for the acts of its agent or employee where a fraud has been perpetrated. In other words the company as principal becomes liable for the acts of its servants or agents who have committed a fraud for their own personal benefit. However the redeeming feature in these cases is that all those agents or employees carried out acts which were within the scope of their authority. Moreover the principals in each of those cases held out or allowed it to be held out that those agents or employees were acting within the scope of their authority. In other words the doctrine of ostensible authority came into play in each of those cases where liability was found against the company as principal.

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[55] In the instant case as has been considered at length under Issue (ii), no such ostensible authority comes into play to invoke liability against the defendant. There was no representation emanating from the defendant to warrant the imposition of ostensible authority on the facts of this case.

[56] On the contrary it is clear from PW1's evidence as I have set out above in relation to Issue (ii) that it is the plaintiff that ought to have been put on inquiry by the significant discrepancies and irregularities that were evident on the face of the fraudulent document, namely the advance payment bond.

[57] It is therefore clear that Turquand's Rule has no application here. Neither does the doctrine of ostensible authority. As such I conclude that the defendant has no liability in relation to the fraudulent advance payment bond. The plaintiff has failed to establish, on a balance of probabilities that the defendant is liable as principal under the doctrine of ostensible authority or the application of Turquand's Rule that for the fraudulent advance payment bond. As such the defendant is not liable to make payment in the sum of RM10m or otherwise to the plaintiff. The plaintiff's claim is therefore dismissed with costs.

Claim dismissed with costs.

Reported by Ashok Kumar